Supreme Court, U.S.
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No. 82-715

In the Supreme Court of the United States

OCTOBER TERM, 1982

ADRON P. BRAINERD, PETITIONER

v.

WARREN E. BURGER, CHIEF JUSTICE OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner waived the separate-judgment requirement of Federal Rule of Civil Procedure 58 when the district court clearly intended to enter a final order, the order was entered on the docket sheet, and petitioner at no point objected to the absence of a separate judgment.

2. Whether Chief Justice Burger is immune from suit for damages arising from the Court's denial of a petition for a writ of certiorari.

3. Whether the district court clerk is liable to petitioner for failing to enter a final judgment as a separate document as required by Rule 58.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. P.1-P.5) is not reported. The opinion of the district court (Pet. App. P.6-P.16) also is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 1982, and a petition for rehearing was denied on April 19, 1982 (Pet. App. I). On July 20, 1982, Justice Stevens extended the time in which to file a petition for a writ of certiorari to and including September 16, 1982, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Ten years ago, petitioner filed suit in the United States District Court for the Northern District of Illinois against two bank officers, alleging that they had violated 18 U.S.C. 1005 and 12 U.S.C. 503 by issuing a cashier's check without authorization and making false entries in bank records. *Brainerd* v. *Beal*, No. 72C157. The district court dismissed the complaint on January 30, 1973 for failure to state a claim upon which relief could be granted and, alternatively, because the claim was barred by the relevant Illinois statute of limitations. Petitioner appealed the district court's judgment on March 2, 1973.

The court of appeals dismissed petitioner's appeal as untimely. *Brainerd* v. *Beal*, 498 F.2d 901 (7th Cir. 1974). The court of appeals found that the district court's judgment was rendered on January 30, 1973 and that the docket sheet listed entry of judgment on that same day. The notice of appeal, which stated that it was "'from the order dismissing the amended complaint entered in this action on the 30th day of January 1973'" (498 F.2d at 902), was not filed until March 2, 1973, clearly outside the 30-day period provided by Rule 4(a), Fed. R. App. P. While petitioner submitted unsworn statements signed by a deputy clerk of the district court, noting that under "normal business practices" a judgment rendered on January 30 would have been entered on the docket January 31 or February 1, the court of appeals refused to permit the statements to impeach the docket. Accordingly, the court of appeals dismissed the appeal for lack of jurisdiction. This Court subsequently denied certiorari (419 U.S. 1069 (1974)) and denied rehearing (420 U.S. 913 (1975)).

2. Petitioner then brought suit against his attorney in Illinois state court, alleging, *inter alia*, that the attorney had negligently failed to file a timely notice of

appeal. The attorney moved for summary judgment, relying upon the affidavit of respondent Cunningham, Clerk of the United States District Court for the Northern District of Illinois. Cunningham's affidavit stated that, under the docketing procedures then in effect in the clerk's office, the district court's January 30, 1973 judgment in *Beal* would not have been entered on the clerk's docket until February 1, 1973, and that petitioner's notice of appeal therefore was timely filed within the prescribed 30-day period. On the basis of this affidavit, the state trial court granted the attorney's motion for summary judgment, finding that the attorney had not acted negligently. The Illinois appellate court affirmed, stating that, in the absence of expert testimony to the contrary, the attorney should be found to have exercised reasonable care in relying on the clerk's customary practice. *Brainerd* v. *Kates*, 68 Ill. App. 3d 781, 786, 386 N.E.2d 586 (1979).

3. On April 17, 1978, petitioner brought the present lawsuit, seeking damages from Cunningham under 42 U.S.C. (Supp. IV) 1983 and the First, Fourth, Sixth and Fourteenth Amendments for alleged deprivation of his constitutional right of access to the courts. Petitioner also asserted that Cunningham violated the Freedom of Information Act, 5 U.S.C. 552, by not responding to a January 18, 1978 request for all papers relating to the notice of appeal and the clerk's docketing procedures. In a separate count, petitioner claimed that Chief Justice Burger, by failing to grant certiorari and remand the *Beal* case, violated his statutory duty to supervise the lower courts and was himself liable for damages stemming from the allegedly improper docket entry.

On October 11, 1978, the district court dismissed petitioner's claim against Chief Justice Burger on the ground that the Chief Justice was immune from suit. The district court also dismissed petitioner's Freedom of Information Act claim against Cunningham (Pet.

App. P.9). On May 29, 1979, the court dismissed petitioner's remaining claims against Cunningham. The district court dismissed petitioner's Section 1983 claim because Cunningham had been acting under color of federal, and not state, law at the time he entered the district court's order of dismissal in *Beal* and certified the record on appeal (*id.* at P.10-P.11). The district court dismissed petitioner's constitutional tort claim on the ground that, under Seventh Circuit precedent, court clerks are absolutely immune from suit when discharging their official responsibilities (*id.* at P.12). Finally, the court denied petitioner's motion under Rule 60(a), Fed. R. Civ. P., to correct the record and require the entry of judgment in *Beal* on a separate document. The court reasoned that the court of appeals in *Beal* had conclusively found petitioner's appeal untimely and, therefore, principles of collateral estoppel would prevent petitioner from relitigating that issue even if the district court's judgment in *Beal* were now correctly entered (*id.* at P.15).

4. The court of appeals affirmed in an unpublished order (Pet. App. P.1-P.5). The court of appeals agreed with the district court's reasons for dismissing petitioner's claims against Cunningham (*id.* at P.2). The court of appeals also agreed with the district court that Chief Justice Burger was immune from suit and that petitioner's Freedom of Information Act suit against Cunningham should be dismissed because the FOIA does not apply to the courts of the United States (*id.* at P.2-P.3). Finally, the court of appeals affirmed the district court's denial of petitioner's Rule 60(a) motion. Finding that disposition of the motion depended upon application of the doctrine of law of the case, the court of appeals reasoned that reconsideration of the question of the timeliness of petitioner's appeal in *Beal* was not

necessarily precluded. Nevertheless, the court of appeals declined to consider petitioner's arguments under Rule 60(a), Fed. R. Civ. P., holding instead that petitioner had waived the "separate document" requirement of Rule 58, Fed. R. Civ. P. (Pet. App. P.5) because

> the district court evidenced its intent to dismiss [petitioner's] complaint entirely, thereby rendering a final, appealable decision; a dismissal was entered on the docket sheet; and the parties both proceeded as if a valid, appealable judgment had been entered.

The court of appeals further noted that it would be unjust to grant petitioner's motion, since over nine years had passed since entry of the district court's judgment in *Beal*. *Ibid.*

ARGUMENT

1. This case presents no issue worthy of further review. Petitioner's principal argument is that his appeal in *Beal* was untimely because the judgment of the district court was not entered on a separate document as required by Rule 58, Fed. R. Civ. P. However, even if petitioner's argument were well taken, the court of appeals correctly held that petitioner waived his rights under Rule 58, since the district court clearly intended to enter a final order, the district court's order was entered on the docket sheet, and petitioner at no point objected to the absence of a separate judgment. "Under these circumstances, [petitioner] should be deemed to have waived the separate-judgment requirement of Rule 58 * * *." *Bankers Trust Co.* v. *Mallis*, 435 U.S. 381, 388 (1978).

2. The court of appeals also was correct in affirming the dismissal of petitioner's claim against Chief Justice Burger. When acting within their jurisdiction, judges are absolutely immune from suit. See *Dennis* v.

Sparks, 449 U.S. 24, 27 (1980); *Stump* v. *Sparkman*, 435 U.S. 349, 355-56 (1978); *Pierson* v. *Ray*, 386 U.S. 547, 553-55 (1967). Since petitioner's claim against the Chief Justice arises from the Court's denial of certiorari in *Beal* and refusal to remand the case, it is based upon judicial acts for which Chief Justice Burger is immune. See *Panko* v. *Rodak*, 606 F.2d 168, 171 (7th Cir. 1979), cert. denied, 444 U.S. 1081 (1980).

3. Petitioner's claim against respondent Cunningham similarly is without merit. As both courts below held, petitioner's claim based upon 42 U.S.C. (Supp. IV) 1983 was improper because Cunningham acted pursuant to the Federal Rules of Civil Procedure, and not under color of state law, in entering the order dismissing *Beal*. Moreover, petitioner's allegations do not show any violation of the First, Fourth, Sixth or Fourteenth Amendments.[1] Finally, Cunningham's alleged failure properly to enter judgment in *Beal* occurred on January 31 or February 1, 1973 (Pet. 7); the present action was not instituted until April 17, 1978 (Pet. App. P.8). Consequently, this action was brought after the expiration of the five-year limitations period provided by Illinois law for constitutional tort actions. See *Beard* v. *Robinson*, 563 F.2d 331, 338 (7th Cir. 1977).[2]

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[1] Even if a plausible constitutional tort claim were alleged, under relevant Seventh Circuit precedent Cunningham was immune from suit for acts taken within the scope of his official responsibilities. See *Dieu* v. *Norton*, 411 F.2d 761, 763 (7th Cir. 1969); *Brown* v. *Dunne*, 409 F.2d 341, 342-343 (7th Cir. 1969) (court clerk found immune from suit alleging "malfeasance with respect to filing documents"). See also *Murray* v. *City of Chicago*, 634 F.2d 365, 367 n.4 (7th Cir. 1980), cert. granted, 454 U.S. 962 (1981), cert. dismissed as improvidently granted, May 17, 1982.

[2] Petitioner does not raise his Freedom of Information Act claim before this Court. As the lower courts correctly held, his suit was barred, since the FOIA does not apply to the courts of the United States. See 5 U.S.C. 551(1)(B), 552(e).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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